THE RECALL OF JUDICIAL DECISIONS[1]

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THE subject which I have been asked to discuss is usually called, though I think miscalled, "the recall of judicial decisions." It is proposed that, when an act passed by a state legislature shall have been declared contrary to the constitution, if a given fraction of the electorate shall petition to have the act referred to popular vote, it shall be so referred, and the people after a period for deliberation shall be given an opportunity to vote directly on it. If a majority of the people vote in favor of the act, it shall thereafter become law. As actually advanced in national and state Progressive platforms, the proposition is not only limited to decisions of state courts interpreting provisions in state constitutions, but is further limited to acts passed under the police power. Thus, the national platform of the Progressive party pledges that party to provide "that when an act passed under the police power of the state is held unconstitutional under the state constitutions by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the act to become a law notwithstanding such decision."

It is, therefore, clear that those of us who advocate this new method of dealing with certain constitutional questions believe that its real usefulness is largely, if not wholly, confined to the situation which arises when an act passed under the police power of the state is declared contrary to the state constitution. The police power of the state is the general power to pass laws which direct the conduct of the individual or private associations of individuals, which says that we must do this or that. It therefore includes practically every law except those which relate to the conduct of public officials or the organization and the oper-

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ation of the government. All acts dealing with social and industrial conditions are passed under the so-called police power. All acts regulating the conditions of employment, payment of wages in store orders, tenement-house conditions, and other acts designed to correct the more obvious social and economic injustices of our present industrial system, are police laws.

A large part of the present criticism of courts and judges, as well as the growing antagonism towards our constitutional system, is due to the decisions of state courts holding void attempts to enact legislation which many believe necessary to correct the more glaring injustices of our present industrial system. The so-called "recall of judicial decisions" is, at the present time, the only constructive proposal advanced to meet a condition which is giving grave concern to those who still believe that government under a written constitution is the best form of government for a democracy. As such it demands our careful consideration.

In order that we may be in a position to judge the proposal on its merits, a preliminary word must be said in regard to what we may call social and industrial legislation, and the peculiar function performed by the courts when they declare such acts as a compulsory workmen's compensation act contrary to the inherent rights of the individual.

Each country has always its social and economic problems, because man, considered collectively, has always the power of further progress. The problem of further progress is one of method. In any society the proper method of improvement becomes a matter of political controversy when a proposition which, it is alleged, will have the desired result and which involves a change in existing law or public administration, is made in such a way as to command serious attention from those having the power to effect the change. Every economic political controversy resolves itself into the question: Is it or is it not wise for society to change by law, in the manner proposed, the conditions under which the individual makes his choice of action?

Two illustrations will make my meaning clear. A given country has no tariff. A protective tariff is proposed. The

question is, will there be greater progress economically if the law changes the existing legal conditions under which the individual now makes contracts for the purchase of certain products? Again, a given community has no law governing the hours of labor. A proposal is made to pass a law prohibiting the employment of women for more than ten hours a day. The question is, should society change in the way proposed the conditions under which the contract of employment is made? In neither case is it proposed that society shall directly coerce the individual. No one is to be obliged to purchase goods or employ women. But in each case the law proposed limits the range of choice; if one buys from abroad he must pay duty; if he employs women he cannot do so for more than ten hours a day. Again, in the second illustration, the proposed law, theoretically at least, limits the woman's range of choice; she cannot contract to work more than ten hours. I say theoretically, because practically the economic situation of the woman may give her no real choice—she must take what is offered.

When we are confronted with the question whether it is wise to adopt a particular tariff schedule or a particular law governing the hours of labor, two things influence our decision. We have the facts bearing on the particular question. But we have also our existing prejudices or principles, call them what you will, relating to the limit to which society should go in imposing restrictive legal conditions. The difference between us at any given time is one of degree. The most extreme individualist admits that in some cases restrictive legal conditions of a drastic character should be imposed. Thus, no one objects to a law prohibiting the general sale of certain deleterious or poisonous drugs, or a law prohibiting the employment in dangerous industries of little children, even with the consent of the children and their parents. On the other hand, the most advanced progressive would regard a law limiting the hours of work for women to two hours in any consecutive twenty-four hours as arbitrary and unjust, or would oppose a compulsory workmen's compensation act which required the employer to pay to any workman who was permanently disabled by an accident occurring in the business double wages for life.

We all of us, conservative and progressive alike, have what we may describe as a mental scale, relating to the limits of regulatory legislation. At one end of the scale are supposed legislative acts, like the act prohibiting the employment of women more than two hours a day, which we regard, not merely as unwise, but as unjust and arbitrary. Further down the scale we come to laws, such as a law limiting the hours of employment of women to ten hours in any twenty-four, which we think wise or unwise, but which do not, even if we regard them as unwise, shock our sense of fairness. Lastly, at the other end of the scale, we have those laws which, while restrictive, we regard as expressing the unquestioned duty of society toward the individual, such as a law prohibiting the employment of little children in dangerous occupations.

Each of us has a more or less distinct mental scale of this kind. It may change from day to day or remain throughout our lives largely the same. That depends upon our experience and our temperament. We may think little of public questions, and our scale may be largely an unconscious one; but when forced to pass judgment upon a given proposal, out of our experience and environment and the extent and character of our study and observation, we reach a decision for or against the proposal by fitting such facts as we think have particular bearing on the question into the scale of arbitrary, unwise, debatable, wise, and essential governmental regulations, placing restrictive legal conditions on the individual choice of action.

While, however, each of us has such a scale, the scale of no two men is ever precisely alike. Certain legislation may be arbitrary and unfair to all of us. When, however, we pass from acts arbitrary to acts unwise, no two of us draw the same line. Indeed, few or none of us draw a very sharp line between arbitrary and unwise legal restrictions. The two classes of acts imperceptibly shade into each other; but the shadow on the scale that marks the passage from clearly arbitrary to debatable acts in any two individuals is never in the same place. Take, for instance, an eight-hour day for women. Some think that a wise proposal, some unwise, others regard it as more than merely unwise, as arbitrary, unfair, and destructive of the fundamental right of liberty of action.

Differences of opinion of this kind on such a measure as an eight-hour law exist in every country. Everywhere disputes arise as to the justice or wisdom of society in placing legal restrictions on the wage contract, employment of children, or the use of this or that kind of property. In all other countries, however, except the United States, such questions are settled finally by the legislature. When the legislature has passed the act, though many may think such action arbitrary interference with the individual and therefore more than merely unwise, nevertheless the legislature has spoken and the act is law. We alone, of all people, live under a system of government in which the courts have been given or have assumed the power to examine into the nature of the act, and declare it void, if it appears to them more than merely unwise; if, in short, in their mental scale it falls into the class of acts arbitrarily interfering with the individual's liberty or property.

You will note that I say that the courts here either have been given or have assumed this right. This is a subject on which those learned in our constitutional history differ. No one, at least no responsible person, accuses the courts of having assumed, without any grounds for the assumption, that they could disregard acts of the legislature which to them arbitrarily restricted the individual's choice of action. Some earlier judges took the position that a legislative act which interfered with what they regarded as inherent individual rights, was void because free governments were established to protect such rights, and when the people adopted a constitution and vested all legislative power in a legislature, they impliedly withheld the power to deprive the individual of his inherent rights. In modern times, as we have drifted away from the assumption that man has "inherent rights," the courts in setting aside acts of the legislature which to them appear grossly arbitrary, have relied on express declarations in the bill of rights which accompanies every state constitution. Now there are in the federal constitution and in all state constitutions clauses which it may be contended were intended to prohibit legislation arbitrarily interfering with the individual's freedom of action or with his right to use his property as he thinks best. The fifth

amendment to the federal constitution provides that the federal government shall not deprive any one of "life, liberty, or property, without due process of law." The fourteenth amendment imposes a similar prohibition on the states. Provisions similarly worded are found in a large number of state constitutions. In some constitutions we find in the bill of rights an express declaration that all men have "certain indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation and of pursuing their own happiness."

In interpreting the meaning of these clauses the courts were obliged to determine two questions. First, did or did not those who adopted the constitution by inserting these words intend to declare that the legislature should not pass an act arbitrarily interfering with the individual's liberty or property, or did they merely intend to declare that an administrative officer or any one else should not, without the warrant of legislative act, interfere with the individual's liberty or property? Practically all our courts, including the Supreme Court of the United States, have decided that the clause relating to due process of law and similar clauses prohibit arbitrary legislative interference with the individual's freedom of action, whether in the use of property or in the making of contracts. The publicist or constitutional lawyer, examining our history, may doubt the correctness of this conclusion; but there has been no vacillation in the position of our courts.

Having decided that the clauses referred to prohibit acts of the legislature arbitrarily interfering with the individual in his use of his property or his power to make such contracts as he pleases, the courts were confronted by a second question. The constitution, while prohibiting arbitrary legislative interference with the liberty of the individual, does not give any standard by which to judge an act as to whether or not it is arbitrary. Should the courts therefore refuse to enforce the provisions of the constitution, or should they do the best they can and declare those acts void which impress them as unquestionably arbitrary and unfair, or which are in their opinion arbitrary and unfair according to generally received standards? I do not mean to

say that the judges went through any such analysis in the first cases involving the contention that an act deprived a person of his liberty without due process of law because it interfered arbitrarily with his right to make a particular contract or use his property in a particular way. The law does not grow in that way. For instance, in 1884, the late Judge Gordon, of the supreme court of Pennsylvania, was presented with the question, is an act prohibiting the payment of wages in store orders constitutional? He did not consider it necessary to examine elaborately its provisions or to analyze the processes by which he came to the conclusion that it was contrary to a state constitutional provision. To him such an act was without question well within that part of his mental scale of restrictive legal acts labeled "arbitrary and unfair." His state had a constitution; the constitution had a bill of rights in which was a general clause inserted to prevent arbitrary legislation. To him the act in question was abitrary legislation. He had no doubt about it. And, therefore, he contented himself with remarking that the act was one which could not be passed in this country.

From the time of Marshall's decision in Marbury *v.* Madison, the people of this country have been familiar with the court's refusal to regard as law acts of the legislature contrary to the constitution. Though there had always been a few people who insisted that the courts should follow the legislative act, leaving it to the people at the polls to rebuke the legislature, most of us have always seen the importance, if we are to preserve government under written constitutions, of the decision of the great Chief Justice. We have also recognized the logical strength of the position that if a court finds a legislative act clearly in conflict with a provision of the constitution under which the legislature acts, the courts should follow the constitution and not the legislative act.

The function preformed by the court in most constitutional cases is to preserve the intent of the people on some clearly defined subject as expressed in the constitution. For instance, experience convinces the majority of the people that the legislature should not have power to pass a law applying to one borough. They adopt a constitution in which they expressly

say that no special law shall be passed relating to one borough. Subsequently, the legislature passes a bill which violates this provision. The court in refusing to recognize the law is preserving the constitution as the people adopted it.

For a long time it was assumed that when an act imposing restrictive legal conditions was overthrown by a court because it deprived individuals, "without due process of law," of the right to contract or to use their property, the court was performing a function in no way different from its function in any other constitutional case. In one sense this is true. The constitution does say: "No one shall be deprived of life, liberty, or property, without due process of law," and in the opinion of the court the act in question does so deprive the individual. In disregarding the act the court is preserving the constitution. But why does the act, which we will say restricts the hours of labor, deprive persons of their liberty or property without due process? There are three possible answers: first, because it is arbitrary in the opinion of the court; or second, because it is arbitrary according to the court's opinion as to what was considered arbitrary legislation at the time of the adoption of the constitution; or third, because it is arbitrary according to the present generally received opinion of what is arbitrary. In any case, the court is not, as in all other constitutional cases, interpreting a precise declaration in the constitution, but is measuring by some more or less uncertain mental scale what is and what is not arbitrary and unfair legal restriction on individual action.

It is perhaps a fair question whether the action of our courts in this class of cases is or is not in accordance with the ideas of those who put into our federal and state constitutions bills of rights containing clauses against depriving a person of his liberty or property without due process of law, or similar general declarations. Quite aside from this question, there is much to be said in practise for a system which provides that an act of the legislature, which in the opinion of men trained in the law, and having a knowledge of our legal history, arbitrarily interferes with the freedom of the individual to contract, or do some other act, should not become a law until the people

have a chance to say at the polls whether or not they wish that act to become law. Admitting that no other civilized country lives under a system in which the judges act practically like a council of elder statesmen, vetoing acts which shock their sense of justice, is there not much to be said in favor of the system?

At the same time the most thorough Tory and Conservative among us has never contended for a moment that, if a persistent majority of the people want an act, they should not have the right to put their desire into effect in spite of the opinion of the court that the act arbitrarily deprives a person of his liberty or property. The only difference is as to the method by which this desire on the part of the persistent majority of the people should be carried out. At the present time we have only one method, the formal amendment of the constitution. If, for instance, in New York a compulsory workmen's compensation act is declared to be contrary to the state constitution because it arbitrarily takes the property of the employer away from him without due process of law, under existing conditions the people of New York, if they have a persistent desire for the act, must amend their state constitution. Indeed, this is what they are doing at the present time. Why, it may be asked, is not this a perfectly satisfactory method?

Let us admit that it is not wholly unsatisfactory. An amendment can be drawn and has been drawn reciting what are regarded as the essential elements of a compulsory workmen's compensation act; on the adoption of this amendment the act can be re-passed. This method of formal amendment, in contrast to the so-called recall of judicial decisions, is often spoken of as "the orderly method of amendment." And yet is it orderly? After you adopt your amendment how does your constitution read? In effect it reads as follows: "Arbitrary legislation interfering with the individual's freedom of contract or taking his property shall not be passed, but any act having the essential elements of a compulsory workmen's compensation act, no matter how arbitrary, may be passed." The process of amendment may be orderly; but is there not something which looks very much like disorder in the result? Should the courts of any state declare much legislation affecting social and

industrial conditions unconstitutional because it deprives the individual of his liberty or his property without due process of law, the constitution of that state would soon become in large part a series of long statements as to what could be done in spite of the due-process-of-law clause. It does not take much foresight to perceive that if in any state there exists for any length of time a difference of opinion as to the necessity for and arbitrary character of certain social legislation passed under the so-called police power of the state, it will not be long before the people will adopt an amendment wiping out forever the due-process provision of their bill of rights.

The real trouble with our present method of amending the due-process-of-law clause whenever the courts under that clause have declared unconstitutional an act persistently desired by the people, is that it is not an orderly because not a scientific method of meeting the situation. The method of formal amendment in such cases fails to recognize the nature of the function which the court has performed in this class of constitutional cases. The court has not declared that the act violates a provision in the constitution which is clear, precise and definite, and which if the people do not like they should abolish. The real situation is that the court has been given, or has assumed, whichever you will, under this due-process-of-law clause or some other similar clause in the bill of rights, the right or power to declare unconstitutional an act which is contrary either to its own or to the generally received ideas of social justice, and therefore subversive of inherent individual rights. What the people need in such a case is not the power to adopt formal amendments to the due-process-of-law clause; it is not the power to take a whole realm of possible legislation and declare that thereafter any law falling within this realm, no matter how arbitrary, shall thereafter be constitutional. The court has declared in effect that a certain act is arbitrary, and as such subversive of the rights of the individual. But if in fact the act, to the majority of the people, does not seem arbitrary, they should have a method by which the act can become law, without forcing them, by the passage of formal amendments to the due-process clause of the bill of rights, to deprive

the court of all power to arrest social legislation of the same class, however arbitrary or unfair such legislation may be. This is exactly the power which it is proposed to give to the people by the proposition known as the recall of judicial decisions. In one sense it is a method of temporarily amending the constitution. In another it is an attempt to preserve the present power of the courts to stop legislation which they believe contrary to the sense of social justice persistently prevalent in the community from going into effect until that community has been given an opportunity to express through the ballot its own opinion of the act.